

DATE: 10/30/97

CASE NO.: 96-STA-30

*In the Matter of:*

DONALD F. CORTES,

*Complainant,*

v.

LUCKY STORES, INC.,

*Respondent.*

John G. Platt  
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Placerville, California 95668

Representative for Complainant

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Food Employers Council, Inc.  
2000 Crow Canyon Place, Suite 200  
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Representative for Respondent

Before: ELLIN M. O'SHEA  
Administrative Law Judge

### **RECOMMENDED DECISION AND ORDER**

This case arises under Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter the "Act"), as amended, 49 U.S.C. §31105, and the regulations in 29 C.F.R. Part 1978. On July 29, 1996, Complainant, Donald F. Cortes, filed a complaint with the Secretary of Labor, alleging that Lucky Stores Inc., ("Respondent"), discriminatorily discharged him in retaliation for

refusing to drive a commercial vehicle because of fatigue. *Secretary's Findings*, ALJ 2A.<sup>1/</sup> The Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration, after an investigation, found that the complaint had no merit. *Secretary's Findings*, Secretary's numbered pages 1-6 of ALJ 2A. On August 23, 1996, Complainant filed an objection to the Secretary's Findings and requested a hearing on the record.

A hearing was held before me on September 26, 1996, in San Francisco, California, at which time both parties were given the opportunity to present their cases.<sup>2/</sup> The Administrative Law Judge entered as ALJ Exhibits 1, 2A, 2B and 2C the identified material which reflected the procedural history of this matter and the underlying agreements the parties could reach. TR 4. Complainant's Exhibits 1, 2, 3, 5, 6 (pages 2-35 only), 8, 9, and 11 were admitted into evidence. TR 59, 75-76, 96, 179, 233, 236-238. CX 4, the unemployment appeal, identified at hearing was not admitted. *See Complainant's Proposed Findings*, footnote 17, at pages 27-28. As the transcript reflects, after the parties' preliminary differences as to this exhibit (when identified within TR 58-68, specifically at TR 66-68), while CX 3 was later used during examination and admitted at TR 179, CX 4 identified as a document to be used for impeachment purposes during Mr. Kaib's testimony was not so used, TR 247-84, and Complainant did not move for its admission before resting his case. Further CX 4 was not filed with this forum for inclusion in the record. No Respondent Exhibits were offered.

Respondent seeks in its post-hearing December 20, 1996 brief's reference to improperly submit as evidence what respondent did not offer and/or what was not in existence at hearing specifically denominated Exhibits A and J. Some of these Exhibits are duplicative of Complainant's admitted Exhibits. However all of respondent's exhibits so offered are not admitted or considered.

Respondent's November 21, 1996 request for extension of the period to file briefs, to December 20, 1996 was telephonically granted by Office staff. Complainant, on December 30, 1996, submitted October 2, 1996 Whistleblower Newsletter case summaries, a submission which did not raise a new issue or further brief any issue of the December 20, 1996 submissions. It merely provided recently issued case summaries and citations on compensatory damages. Respondent then filed a December 31, 1996 letter of objection. The ALJ's January 7, 1997 Notice was an exercise of caution to ensure both sides had equal opportunity to submit case law summaries/citations they believed appropriate given what had developed between the parties on Complainant's December 30, 1996 submission. Complainant's January 18, 1997 and Respondent's January 20, 1997 letters

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<sup>1/</sup> The ALJ's and Complainant's exhibits will hereinafter be referred to as "ALJ," and "CX," followed by the exhibit number or letter and the page number. "TR" refers to the transcript followed by the applicable page number.

<sup>2/</sup> Both Respondent and Complainant were represented by non-attorney representatives.

followed, as did the ALJ's February 7, 1997 Notice.<sup>3/</sup> Subsequent to September 26, 1997 the ALJ conducted no ex parte communications with any person or party in this case. 29 C.F.R. §18.40.

Complainant and Mr. Robert Kaib, the Transportation Department Manager, Vacaville, California for Respondent, both testified at trial. TR 77, 247. The parties stipulated that jurisdiction was proper. TR 14. The issue presented for adjudication was whether Respondent violated the Act when it terminated Complainant for refusing to drive. Upon considering the testimony at trial and the evidence in the record, I reach the following recommended Decision and Order.

### **Law and Regulations**

Complainant asserts that Respondent violated Section 31105(a) of the Act by discharging him when he refused to operate a commercial vehicle while fatigued. Section 31105(a) provides:

- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because ----....
  - (B) the employee refuses to operate a vehicle because ---
    - (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;
    - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
- (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for

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<sup>3/</sup> See hereby incorporated June 19, 1997 ALJ letter response to Mr. Platt's June 9, 1997 letter as to delay in decision issuance. Management decisions and priorities, the timing of case assignments,

Footnote <sup>3/</sup> (Cont'd)

given the number and volume of assigned cases which do not settle and/or continue, including under 30 U.S.C. §901, with their resulting impact on utilization of available time, effect the timing of decision issuance.

protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

The applicable regulation that Complainant asserts was violated is 49 C.F.R. §392.3 which states:

No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### ***BACKGROUND***

Complainant at hearing was a 59 year old commercial vehicle operator with thirty-five years of experience who had worked for Respondent, Lucky Stores Inc., (Lucky's) a large grocery chain, since April 24, 1981, in work subject to this Act's jurisdiction. TR 79, CX 3:129. He is a member of Teamsters Local #490 of Vallejo, California, which has a Collective Bargaining Agreement with Respondent. TR 130, CX 6. Complainant is also a member of Teamsters for a Democratic Union, which publishes on and advocates trucker safety. TR 102-103.

Complainant drives an 18-wheeler tractor/trailer truck out of Lucky's Vacaville, California warehouse facility delivering groceries to Lucky stores five nights a workweek. As of May 23, 1996 and for about a year and a half to two years he had been on the 5 p.m. shift. He worked each night, Sunday through Thursday from 5 p.m., generally ending each a.m. an hour and a half after midnight. He testified he has been working nights for a lot of years. TR 120. Kaib testified the 100 drivers out of his Lucky facility drive an average of 8,000 miles a year. TR 261. Complainant as a driver does not generally unload the truck.

Prior to starting his 5 p.m. Thursday May 23, 1996 shift, the last workday of his usual five day workweek, Complainant had worked 38.3 hours. 32 regular hours during the preceding four days, plus 6.3 overtime hours. The 6.3 hours of overtime worked in the four workdays prior to May 23, 1996 were spread out over these four workdays, in half hour to two hour increments. He did not work more than two hours overtime in any one of those prior four days in that workweek.

Cortes was not able to leave the warehouse until about 6 p.m. May 23, 1996, given his necessary duties preliminary to his run and following driver supervisor Tom Krug's meeting with the four 5 p.m. shift drivers May 23, 1996. Thus with his regular hours May 23, 1996 - May 24, 1996 a.m. and this hour's overtime, as of that a.m. Cortes had worked 47.3 hours in his five day workweek. 40 regular hours and 7.3 overtime hours. These were Cortes' hours worked that week when, at his early a.m. May 24, 1996 warehouse return he advised graveyard dispatcher Tavares that because he was fatigued he would not be in to take the May 24, 1996 6<sup>th</sup> day shift Krug had ordered.

The 5 p.m. shift drivers, including Cortes, had been advised by Krug their May 24, 1996 work was mandated. It was compulsory under their union contract. They were advised they could pick their start time, anytime up to 7 p.m. according to Kaib, Krug's supervisor. Kaib's indication of a later than 5 p.m. start time is credited as this representation is in accord with Cortes' replies at CX 3.

Cortes did not testify here to the hours he had worked in the preceding workweek May 12, 1996 through a.m. May 17, 1996 and what Respondent sets forth as his hours worked this week, *Employer's Brief*, page 3, is not evidenced here or in CX 3, his arbitration hearing testimony/decision. But from Complainant's STAA presentation there is no reason to infer that in this preceding workweek he worked unusual hours. In the workweek ending May 10, 1996 Cortes had been on vacation and in the April 28, 1996 through a.m. May 3, 1996 workweek he had worked 32 hours, according to his CX 3, 140-41 testimony.

According to Article 15(C) of the Collective Bargaining Agreement Lucky can require drivers to work overtime if necessary, CX 6:15, referred to by the witnesses and in argument as "being manditoried." While this Article indicates overtime is not compulsory if the employee notifies Lucky at the beginning of his shift he does not want to work overtime, Lucky may require (or mandatory) overtime work to ensure all necessary work is performed. This Article also requires that drivers complete all runs taken out whether or not overtime is involved.

This run completion requirement appears to be the basis on which during the four days Complainant did work Sunday May 19, 1996 through Wednesday May 22, 1996, and prior to his work the night of May 23, 1996 - May 24, 1996, he had accumulated his 6.3 overtime hours that week. It is also the basis on which he accumulated an additional hour's overtime a.m. May 24, 1996, to add to the 6.3 hours. TR 285-287. A driver's work includes yard parking after warehouse return at the end of his shift, and before he goes off the clock. And it includes on-the-clock work at the beginning of his run, to perform required safety inspection of his trailer truck. TR 100, 196-198.

Robert Kaib is Lucky's Vacaville Transportation Manager. He is the decider and issuer of the May 29, 1996 suspension letter and June 6, 1996 termination letter Complainant received after the May 24, 1996 - May 27, 1996 events at issue. CX 1, 2. On these dates Tom Krug and Leroy Vierra were Kaib's and Complainant's truck driver supervisors. Both had left the warehouse as of Complainant's early a.m. May 24, 1996 advice to dispatcher Tavares.

Kaib testified that several months before May 23, 1996 Lucky had instituted several promotional items, a coupon book and a reward charge card to increase Lucky's grocery sales. With the end-of-the-month effect of these items and the approaching Monday May 27, 1996 Memorial Day holiday, which also increased business and the number of truck loads to be delivered to the grocery stores, he told Krug and Vierra to engage the required number of drivers to cover Lucky's May 25, 1996 delivery needs, and that to get the drivers needed, absent volunteers, the drivers would be told they were being "mandatoried;"<sup>4/</sup> they had to work May 24, 1996.

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<sup>4/</sup> Witnesses used this expression for ordered overtime mandated or compulsory under the Collective Bargaining Agreement.

It is a fact Krug at 5 p.m. May 23, 1996 then spoke to the four Lucky drivers scheduled for the 5 p.m. shift. They were assembled in the drivers' lunch room at the start of their Thursday night shift including Complainant and a driver Fatheree. Vierra was in attendance. In the presence of all four drivers, when none volunteered for May 24, 1996, Krug then told all four they were "mandatoried" for May 24, 1996, given business necessity. In Cortes' case this was a 6<sup>th</sup> work day in that workweek and his usual day off.

Kaib also testified Krug told the four drivers that in the past Lucky had offered drivers their choice of setting their own start time the "mandatoried" day, to accommodate their plans. The four drivers were told Krug would similarly make it easy on them and they could so choose their May 24, 1996 start time; Krug told them they could start anytime May 24, 1996, after they were off-the-clock 8 1/2 hours, including at their regular shift start time. They were directed by Krug to let the dispatcher know the time they would like to start their May 24, 1996 shift. TR 181-183. According to Kaib's testimony at hearing somewhere between 5 p.m. and 7 p.m. would be the latest Lucky would have expected them to be at the warehouse May 24, 1996, to begin their shift, so as to get deliveries to their stores by midnight. According to Kaib each "mandatoried" driver was to leave a May 24, 1996 start time with the graveyard dispatcher when they completed their Friday early a.m. run. Kaib later learned Fatheree and Cortes left word with the graveyard dispatcher <sup>5/</sup> they were fatigued and Complainant did not report for work May 24, 1996.

Complainant testified he told Krug when Krug requested volunteers for May 24, 1996 that he did not care to work the following day. This was prior to Krug's notice he was mandated for May 24, 1996, his 6<sup>th</sup> work day, to which Krug direction Complainant testified he made no response. He did not tell Krug at that time that he would be too fatigued if he came in on his regular day off, although he knew what hours he would have worked that week as of the end of his May 23, 1996 shift with his previous 38.3 hours worked, because "I wasn't too tired at that time ... at that particular moment, I didn't feel excessively tired ... It just didn't occur to me to tell Mr. Krug anything. TR 123-124; 174-81; TR 183-190.

According to Complainant he was not paying much attention to a conversation Krug had with one of the other three drivers during the overtime meeting Krug conducted. However it is established as fact that Fatheree in the presence of all four drivers including Complainant, told Krug after they were advised by Krug that they were "mandatoried" for May 24, 1996 that this sounded more like the military and he didn't think he should have to work May 24, 1996. Krug's response to this Fatheree statement was to the effect he knew Fatheree had been in the Air Force, an A.F. E-9, and he asked Fatheree how Fatheree would treat an airman if he talked to him like that. Fatheree's response to Krug was that as an E-9 he'd tell the airman Fatheree owned him 23 hours a day and the airman could have an hour. TR 176-181; TR 251-254.

Krug directed the dispatcher to pull and retain these four drivers' timecards to receive the information from each at shift's end as to their choice of next day reporting time. After his shift ended Complainant searched for his timecard. TR 124; TR 202-203. Cortes testified that at the end

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<sup>5/</sup> Graveyard dispatcher Tavares.

of his Thursday night's work May 24, 1996 a.m. when dispatcher Tavares, who approached Complainant with his timecard in his hand asked him what time he wanted to come in the next day, Cortes replied, "I don't think I can. I'm wiped out. I'm so tired, I cannot. I'm fatigued. I won't be in". TR 124, 134; TR 202-205. He then punched out and drove his pick-up truck approximately 15 minutes to his home. He reported for work Sunday May 26, 1996 and his 5 p.m. shift. According to the Arbitrator graveyard dispatcher Tavares is a member of the bargaining unit and does not have authority to excuse or refuse to excuse the employees' assignment to a mandated shift; his responsibility is to report what he is told by the drivers. See TR 114; TR 124-128; CX 5.

Other than Complainant's statement to the graveyard dispatcher when he returned from his run in the early hours of May 24, 1996, Complainant had no contact or conversation with any supervisor or management official about his "mandatoried" May 24, 1996 work until he was called to a meeting with Kaib when he reported for his Monday May 27, 1996 shift. TR 191-93.

Kaib, on Monday May 27, 1996 <sup>6/</sup> met with Complainant and Fatheree in the presence of Krug, and Vierra. A Mr. Halsy, an individual representing Complainant and Fatheree under the collective bargaining agreement also attended Kaib's meeting because it could lead to discipline. Cortes testified he asked Halsy to attend as a witness. Kaib stated to both Complainant and Fatheree he understood they had been manditored, they failed to show up for work and he would like to know why.

Cortes responded he thought the Department of Transportation or CHP ought to be there during the conversation and also indicated to Kaib he was tired. When asked his basis for being fatigued he indicated it was "that he knew his body and that he knew he was going to be fatigued." When Kaib asked Cortes how he could tell that, essentially 14 1/2 hours before his usual 5 p.m. start time, other than to state he knew his body, Cortes did not further respond to Kaib's inquiry. TR 254-257; TR 206; TR 139. Cortes made no reference to the hours he had worked in this Kaib meeting nor did he state that he had almost fallen asleep at the wheel on his May 23, 1996 - May 24, 1996 run. TR 267; TR 257.

Kaib testified the direct order Cortes was given was to report to work. And by not coming to work, when he said he was not going to be at work, that was a violation of the direct order mandatory overtime instruction the supervisor had given him. TR 270. He was terminated for this insubordination. Kaib testified that on a regular routine basis Lucky's policy and practice regarding someone calling in sick or fatigued is that they are expected to call in a couple of hours before their starting time. At the 7/23/96 joint arbitration hearing Kaib testified Fatheree's response at the May 27, 1996 joint meeting was he did not believe Lucky had the right to work him on his day off. CX 3:96-97. Fatheree then questioned Kaib 5/27/96 as to why Lucky was doing this, assumedly mandating a compulsory extra day shift, "pissing people off, what about the 20 guys I laid off." Kaib testified somewhere in these 5/27/96 exchanges and discussion following Fatheree's 5/27/96 statement to Kaib as to Lucky not having the right to work him on his day off, Cortes' statement he believed Kaib should have the Department of Transportation or CHP in the room May 27, 1996

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<sup>6/</sup> Kaib had been away from the Vacaville warehouse Sunday.

occurred. Kaib indicated to Fatheree in Cortes' presence May 27, 1996 they were not there to discuss Kaib's driver lay-off decisions but why Fatheree did not come to work. CX 3:96-97. While Fatheree, at the arbitration hearing, offered physical health reasons for why he was fatigued May 24, 1996 Cortes stated only that he did not follow the supervisor's mandated compulsory overtime order because he was tired and fatigued. Including at CX 3:38-39.

Kaib's May 29, 1996 letter notified Complainant he was suspended pending further management investigation/review resulting from his failure to follow direction from management and abide by the provisions of the Collective Bargaining Agreement, and that he would be further advised of the outcome of the investigation. On June 6, 1996 Kaib advised that upon completion of the investigation he had determined Complainant's May 23, 1996 - May 24, 1996 actions were in direct violation of instructions and constituted insubordination, and a refusal to perform work as required. Consequently Cortes was terminated effective immediately. CX 2.

Both Complainant and Fatheree, who was also terminated, pursued a grievance through their union to a binding arbitration hearing. At the preliminary Board of Adjustment meeting Complainant had no further explanation for why he claimed he was so tired 5/24/96. TR 257. At the July 23, 1996 arbitration hearing held under the collective bargaining agreement in the joined matters of Fatheree's and Cortes' grievance, Cortes could not remember specifically why he was so tired at 2 a.m. May 24, 1996. Other than his age and the physical demands of the job. He testified there, as he did in this STAA proceeding, that it took him two days to rest at the end of his normal workweek. He swore at the arbitration hearing he did not recall anything that happened the night of May 23, 1996 - May 24, 1996 to account for his fatigue.

The Arbitrator held the termination was too severe for employees with Cortes' and Fatheree's length of service with no record of prior discipline and he ordered their reinstatement. In Cortes' case, reinstatement to the date of termination with backpay. The Arbitrator stated that in view of the work Cortes had already performed in his workweek the Arbitrator was in no position to rule that later on Friday Cortes was not so tired he could drive safely. But the Arbitrator ordered a physical examination by a Company doctor to determine if Cortes should be limited in terms of overtime work.<sup>7/</sup> The Collective Bargaining Agreement states that an employee reporting for work is required to be fit to perform all the duties of his position including mandatory overtime when required. CX 6.

But as to Fatheree the Arbitrator concluded Fatheree did not want to work Friday May 24, 1996 and he was testing the system. Two employer witnesses, Kaib and Krug had testified Fatheree in Kaib's meeting May 27, 1996 said he did not think Lucky had the right to force him to work on his day off, a May 27, 1996 statement Fatheree denied. CX 5. The Arbitrator's opinion indicated the fact both Fatheree and Cortes claimed fatigue after completion of their May 23 - May 24, 1996 shift could suggest they jointly planned to avoid work by claiming §392.3 fatigue.<sup>8/</sup> But he indicated

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<sup>7/</sup> Lucky represented that as of this STAA hearing this examination had not occurred. TR 38-39.

<sup>8/</sup> 49 C.F.R. §392.3.

there was no evidence they planned to claim fatigue before going out separately on their respective routes and returning to the warehouse at separate times. Complainant denied at hearing here that he and Fatheree conspired together not to work, or even discussed this. TR 133. Kaib at 282-283.

Cortes returned to his Lucky employment Labor Day September 1, 1996 as a result of the Arbitrator's order. According to Cortes' testimony he was not paid the back monies he was due until September 26, 1996, the day before this STAA hearing. CX 11. Fatheree was never named or identified by Cortes in Cortes' testimony here, but he indicated he believed Lucky was retaliating against him and "this other fellow" in their effectuation of their back pay award. TR 153-59.

Cortes also testified to three conversations with Kaib in the three days immediately on his return where, according to Cortes, Kaib, a little vague about it, told him there was a possibility Lucky was going to deduct his unemployment checks from his back pay but the next day he told him they were not. TR 149, 153-54; at cross TR 214, 218-219; TR 244. There is some representative non-testimonial indication the Arbitrator retained jurisdiction for purposes of determining whether the ordered back pay award was satisfied. TR 146. Also, some non-testimonial questions as to the meaning of the Arbitrator's decision as it effects reference removal from Cortes' file. TR 238-39.

At this STAA hearing Cortes testified he needs two days of rest and he rests most of the first day he is off. To leading questions on direct he indicated his 5 p.m. shift occasionally makes it hard for him to sleep but he did not indicate any sleep difficulty May 24, 1996. Cortes testified he slept 8-10 hours on his return home and rested the rest of May 24, 1996 at home. To leading questions on direct Cortes indicated he was at home the evening of May 24, tired, not alert, dozing off watching TV and he did not think he was in any shape to drive a truck. TR 136-37. The only time Cortes explained his "I know my body" remarks and getting proper rest, was in the context of "crossing" his hours, by which he meant, not keeping to a late-to-sleep schedule and getting up early in the a.m., not applicable to the 5/24/96 5 p.m. start here.

Cortes testified Lucky does not have a policy for calling in fatigued. To his knowledge, he has never been told to go to the medical department when he has informed the dispatcher he was sick; he has never brought in a doctor's note. TR 128 cross at TR 163-64; TR 170-71. So just as he has told the dispatcher he was sick and has not given a reason, he told the dispatcher May 24, 1996 he was fatigued. Because, under the provisions of §392.3, he knew it would be both legally and morally wrong for him to drive a truck. He testified he determines if he is fatigued and a safety hazard, and it would not make any difference if a doctor told him he was not fatigued, he would still be fatigued. TR 137-38. Cortes testified as a reasonable man he felt he would be jeopardizing the public, himself and Lucky Stores if he went out again May 24, 1996; he had worked an excessive amount of overtime. TR 135.

According to Cortes he told Kaib May 27, 1996 he did not refuse to work; he told him he was tired. He testified his May 27, 1996 comment to Kaib the Department of Transportation or CHP should be there was because he did not have a copy of the regulations with him and he guessed he was on the defensive in that remark to Kaib's question and he felt he needed a little help to explain his situation.

Cortes had not told Krug in the lunch room drivers' meeting he could not work the mandatory next day-extra day although he then knew his body needed two days rest. Because, he explained, at the moment of Krug's request/mandate, he was not tired, excessively tired. He was then asked what happened during the ensuing shift, to make him excessively tired. He testified his normal driving duties made him so physically tired he was falling asleep on his way back to Vacaville. TR 186, TR 188-191. At hearing here, unlike his testimony at the arbitration hearing, or his May 27, 1996 responses in the Kaib meeting, Cortes now testified he was falling asleep delivering groceries May 23, 1996 because he was so tired. He had such a hard time keeping awake at the wheel he had to have the air-conditioning on on the way back; he had to roll the windows down, and play the radio; he took all his breaks, lunch and coffee, he was so tired. He testified he was looking for his timecard having arrived at the yard about 2 a.m. when Tavares who had his timecard in his hand asked him what time he wanted to come in the next day. He would absolutely not have been able to work all night long if he reported for work May 24, 1996. He needs two days rest.

Cortes testified there is not as much tension in driving a pick-up truck as driving a tractor/trailer combination and he tends to relax in his pick-up truck, and thus he was not concerned to be driving home at 2:30 a.m. in such a fatigued state, after almost falling asleep at the wheel of his tractor-trailer, so fatigued he had just advised Lucky, without sleep and 14 1/2 hours before his usual 5 p.m. start time of such fatigue he could not work that night. He was then asked whether this fatigue, and the almost falling asleep experience at the Lucky tractor wheel was not a safety concern to him when, no longer under tension and relaxed, he then took the wheel of his pick-up truck, on interstate and local roads. Complainant replied he was pepped up by the half-hour or so yard physical activities, including walking around he had to do in connection with parking his tractor/trailer at run's end. When then asked to compare whether 8-10 hours of sleep would pep him up, Cortes testified he could not measure this. Further, according to Cortes, minimal damage would result if his pick-up truck had an accident as compared to the horrendous damage if a tractor/trailer has an accident. TR 229-33.

### ANALYSIS

In order to establish a *prima facie* case under the employee protection provisions of the Act, Complainant has the initial burden of proving that: he engaged in protected activity under the Act; he was the subject of an adverse employment action; and Respondent was aware of the protected activity when it took the adverse action. *Self v. Carolina Freight Carriers Corp.*, 89-STA-9, (Sec. Dec. 1/12/90); *Sickau v. Bulkamatic Transport Co.*, 94-STA-26 (ALJ June 22, 1994). Moreover, Complainant must present sufficient evidence to raise the inference that the protected activity was the likely reason for the protected activity. *Id.* Once Complainant demonstrates his *prima facie* case:

the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. If the defendant is successful in rebutting the inference of retaliation, the plaintiff bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons were a pretext for discrimination. *Moon v. Transport Drivers Inc.*, 836 F.2d

226, 229 (6<sup>th</sup> Cir. 1987) (applying the analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973)).

Complainant avers that he engaged in protected activity under Sections (B)(i) and (B)(ii) of the Act when he refused to drive on May 24, 1996. *Complainant's Proposed Finding of Facts and Conclusions of Law* at 12-13. In order to demonstrate protected activity under Section (B)(i), Complainant “must show that the operation would have been a genuine violation of a federal safety regulation at the time he refused to drive--a mere good faith belief in a violation does not suffice.” *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2<sup>nd</sup> Cir. 1993); *Assistant Secretary & Boyles v. Highway Express*, 94-STA-21 (Sec’y July 13, 1995); *Brame v. Consolidated Freightways*, 90-STA-20 (Sec’y June 17, 1992).<sup>9/</sup> Complainant must prove that 49 C.F.R. §392.3 was violated, which requires that he prove that his “ability or alertness was so impaired, or so likely to become impaired, as to make the vehicle operation unsafe.” *Smith v. Specialized Transportation Services*, 91-STA-22 (Sec’y April 30, 1992) (citing *Mace v. Ona Delivery Systems, Inc.*, 91-STA-10 (Sec’y Jan. 27, 1992); *Self v. Carolina Freight Carriers Corp.*, 89-STA-9 (Sec’y Jan. 12, 1990)).<sup>10/</sup>

I find that Complainant has not demonstrated that his fatigue almost fifteen hours before his shift was to begin, made him “so impaired as to make the vehicle operation unsafe” or “so likely to become impaired”, at the time of the mandated shift. *Smith, supra*. Complainant stated that he was too fatigued to work between 2-2:30 a.m. on Friday May 24, 1996. TR 124, 134-137. Mr. Krug indicated that he could pick his time to report later that day. TR 181-183, see also TR 253. As his regular time to report was at 5 p.m., this would allow him at least fourteen hours to sleep and prepare for the shift. TR 124. Complainant was on duty for only nine hours on the May 23-24 shift, of which approximately seven to eight hours were driving, and he had almost fifteen hours to sleep and rest between shifts. TR 124. While he had worked five days plus 7.3 hours overtime as of 2-2:30 a.m. Friday May 24, 1996, the overtime he had worked was spread, in limited amounts, over what were the essentially five days he had worked that week, two to three hours overtime a part of his normal work week.<sup>11/</sup> TR 115. In determining the Section (B)(i) issue, as well as the reasonable belief issue of Section (B)(ii), and his credibility overall it is noted that when Complainant told Kaib, in the serious circumstances of the May 27, 1996 meeting, that he did not work because he was tired or fatigued, and he knew his body, he used only these generalized and limited words. He never there mentioned that the hours he had worked, or any overtime hours he had worked, played any part in the tiredness by which he determined that he was and would be too fatigued to work at the time ordered to work, almost fifteen hours before his report time and opportunity to follow his regular sleep pattern. There are further credibility problems in how Complainant represented himself May

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<sup>9/</sup> Although these cases refer to either 49 U.S.C. §2305(b) or Section 405(b) of the Surface Transportation Act, the statute was recodified at 49 U.S.C. §31105 (West Supp. 1995) and contains essentially the same provisions.

<sup>10/</sup> Complainant’s own exhibit includes a recommendation that the Federal Highway Administration complete rulemaking which requires that drivers obtain eight hours of rest after driving for ten hours or being on duty for fifteen hours. CX 9:4.

<sup>11/</sup> Complainant seeks weekly overtime hours as part of his requested relief here.

27, 1996 and at STAA hearing, as reflected below, which bear on what must be persuasively established by his representations to find he engaged in protected activity under Section (B)(i).

The mere fact Complainant stated he was fatigued at the end of his shift, almost fifteen hours before he had to actually report and drive does not invoke the protection of 49 C.F.R. §392.3. To invoke the protection of this regulation and therefore the Act, Complainant must demonstrate by the circumstances that “the driver’s ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.” Neither his bare assertions, in the fact circumstances here presented, that he was fatigued or tired almost fifteen hours before the shift began, without any supporting evidence, either medical or otherwise, nor his supposed “good faith” belief, demonstrate an actual violation of the Section 392.3. TR 123, 134-137, 140.

Complainant must, under Section (B)(i), establish by a preponderance of the evidence that an actual violation of 49 C.F.R. §392.3 would have in fact occurred through his fatigue in operation of the vehicle after he represented he was so fatigued he could not do so,<sup>12/</sup> almost fifteen hours earlier, and with an intervening opportunity for his regular sleep routine.

Complainant’s testimony he knew his body needed two days rest, he rests most of his first day off, and he was fatigued by his activities driving the tractor/trailer, as Complainant’s testimony was presented here, his led self-serving statements did not further enlighten or persuade as to any probative basis for how he would know, without following his normal sleep routine, that he would be fatigued fourteen hours later so as to then make it unsafe for him to operate his truck. His led self-serving testimony as to what occurred in his home the night of May 24, 1996 did not enhance his credibility. Nor did his uncorroborated representations he does nothing but rest his first day off.

As presented, as his testimony was elicited, and as this witness presented and portrayed himself on the stand, and in how he responded to questions in this STAA proceeding, Complainant did not impress as credible or believable in person, or by the substance of his representations. This included when he represented here he had been falling asleep at the wheel during his May 23, 1996 run, and when he described what he had to do to keep awake, during which, as he testified, he had to be urged to speak up. There was something in how, in his demeanor, in his self-described mumbling, when he so represented on the witness stand he was falling asleep on his May 23, 1996 run; and in how he responded to questioning on, and explained why he elected to drive home in his attested fatigued state the early a.m. of May 24, 1996, including in his depreciation of the effect of an accident in his pick-up, that raised disquieting questions in the factfinder as to this witness’ credibility. As did his explanation of why, if he knew his body needed two days rest he did not straightforwardly so advise Krug at the drivers meeting; or at the May 27, 1996 Kaib meeting specify the details he alleges here as true. His lack of memory of Fatheree’s statements to Krug at that meeting and Krug’s reply also did not enhance credibility.

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<sup>12/</sup> Factually, in this STAA proceeding although Complainant’s ending advice to dispatcher Tavares was he would not be in, his initial words to Tavares were his less definite he did not think he could later drive.

Complainant's testimony as to how he responded to Kaib's questions in the Cortes-Fatheree May 27, 1996 meeting did not indicate he advised Kaib he had been struggling with sleep at the wheel during his 5 p.m. May 23, 1996 run, as he did not refer in his May 27, 1996 responses to Kaib to the hours he had worked as the reason for his tiredness/fatigue. He verbalized only generalizations and conclusions in the May 27, 1996 Kaib meeting which he knew from its circumstances was a serious matter. To almost fall asleep is a significant specific fact experienced by a driver. Especially one knowledgeable as Complainant was on trucker safety. And if a driver's hours worked are the reason for fatigue, or future fatigue anticipated after opportunity for fourteen hours rest and sleep, these are specific facts a credible individual and driver states when explanations are elicited in the May 27, 1996 circumstances which occurred. Complainant not only did not verbalize the May 24, 1996 almost sleeping at the wheel occurrence May 27, 1996, or any other specific in the May 27, 1996 meeting where his generalized tired explanation using the §392.3 fatigue word was essentially his only explanation, Cortes' responses to Kaib occurred in the course of a dialogue where he heard Fatheree question Kaib's right to mandate overtime and Kaib's driver lay-off decisions. These were statements from which Complainant did not disassociate himself. Rather than supplying the personal specifics he now represents in this STAA proceeding as true, including falling asleep at the wheel, he made his Department of Transportation/CHP remarks, explaining these references here as defensive.

Complainant in personal appearance impressed as well-able to articulate what he intended to convey, May 27, 1996 and at this STAA hearing. He impressed here as crafting his responses to portray what he sought to portray; and he was adept at handling the representatives' situation and questioning as it developed over the course of the proceeding. There was nothing in Complainant's physical appearance at this trial, or in his testimony, to indicate he was other than physically and mentally fit for his age and without physical problems including an ability to express himself so as to voice and explain existing personal facts in order to protect his own interests. He impressed as well-able to defend himself with personal specifics. Particularly at the significant May 27, 1996 Kaib meeting where his silence on these personal facts and what he elected to say there does not impress on his veracity on the STAA issues. At arbitration hearing he was represented by an attorney; his falling asleep on the 5 p.m. May 23, 1996 run was not developed at this proceeding, or mentioned by the Arbitrator. Krug's credited testimony establishes Complainant never advised him May 27, 1996 he had been falling asleep at the wheel on his May 23, 1996 5 p.m. run. Complainant's STAA presentation impressed as a knowing witness who deliberately revises and tailors his story, and it appears this allegation developed for purposes of this STAA proceeding. There is nothing in Kaib's presentation or Complainant's testimony to indicate that any Lucky driver who reports to work and advises then or during his shift he is too tired/fatigued to drive is required to drive by Lucky under these circumstances, so as to support Complainant's report-for-duty arguments under Sections (B)(i) and (B)(ii) fourteen hours in advance of his sleep opportunity and his report time.

When the facts in each of the cases Complainant cites for his Section (B)(i), 49 C.F.R. §392.3 regulatory protected activity violation are examined: the details of the on-call and then work hours of *Self, supra*; the nine hours work of *Yellow Freight v. Reich*, 27 F.3d 1133 (6<sup>th</sup> Cir. 1994) and the particular on-call waiting dispatch hours put in by that driver prior to the nine hours and the nap incidents of that factual work-driving situation; and when the particular facts delineated as to the

drivers' work circumstances and hours are examined in *Pauquin v. J.B. Hunt*, 93-STA-44, (Sec. Dec. 7/19/94) and *Webb v. Hickory Springs, Inc.*, 94-STA-20 (Sec. Dec. 8/5/94), the cases Complainant cites in his (B)(ii) arguments, it is evident how totally different and distinguishable the facts and Complainant's circumstances here are as compared to all these drivers. I find, therefore, that Complainant has not shown that he engaged in protected activity under Section (B)(i) of the Act.

Complainant, also claims that he engaged in protected activity under Section (B)(ii) of the Act, in that he asserts that he "held a reasonable belief to report to work would endanger himself and the public." *Complainant's Proposed Findings at 2-3*. Although the wording of Section (B)(ii) refers to the "vehicle's unsafe condition," the Secretary has held that a refusal to drive because of illness or a physical condition may constitute protected activity under Section (B)(ii) as well as (B)(i). *Smith, supra*.<sup>13/</sup> The test under Section B(ii) is that "the unsafe condition must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health resulting from the condition." *Id.*; *Mace, supra*; 49 C.F.R. §31105(a)(2). Since Section (B)(ii) also requires the driver to report the unsafe condition to the employer and seek correction, Complainant urges his report of fatigue and Lucky's constructive notice from his timecard of his hours worked satisfies this section (B)(ii) requirement.

I find that Complainant has not demonstrated that a reasonable person under the circumstances would conclude that a bona fide danger existed. As stated above, Complainant stated he was too fatigued to work, when he had the opportunity to sleep up to fourteen hours and possibly more, before he was required to work again. TR 124, 135, 137. A reasonable person in this situation would not conclude that a bona fide danger existed. If, perhaps, Complainant had to drive immediately after finishing a nine hour shift or had reported an hour or two before the required extra shift that he was fatigued or he had not slept the night before and was too fatigued to drive, then a reasonable person may have concluded that a *bona fide* danger existed. In this case, however, Complainant has not presented sufficient credible or probative evidence of his actual fatigue, beyond his own self-interested questionable uncorroborated assertions, that lead me to believe that his driving would create an imminent danger of an accident, injury or serious impairment of health.

In reaching the Section (B)(ii) finding I have considered the Complainant's subjective statements in the context of the other conversations of May 23, 1996, and what he testified he did and did not say, and why, in the drivers' room at the Krug meeting; what he said he said to the graveyard dispatcher; how Complainant elected to report he would not be working the May 24, 1996 work Krug had mandated under the circumstances depicted; the description and circumstances as to what transpired at the May 27, 1996 Kaib meeting, what Complainant did and did not say; what transpired at the union grievance and arbitration proceeding, what was said and not said. The evidence as a whole does not convince Complainant was actually a credible and persuasive witness unable to drive safely and without *bona fide* danger of accident on the May 25, 1996 shift Lucky mandated. Further,

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<sup>13/</sup> Again this finding was based upon the Act before its recent codification, and refers to the two sections as the "because" clause and the "when" clause, which refer to Section (B)(ii) and Section (B)(i) respectively.

the generalized fatigue advice Complainant gave Lucky through the graveyard dispatcher May 24, 1996, in the circumstances presented and in the face of his timecard's hours does not constitute seeking from this employer correction of an unsafe condition. It is further found the termination/discharge actions Lucky took following Complainant's May 27, 1996 fatigue explanation at the Kaib meeting, following Complainant's generalized self-appraised conclusions, in the circumstances of that May 27, 1996 setting, with no enlightenment offered as to the basis of his fatigue, or expected future fatigue, did not provide Lucky with adequate knowledge so as to constitute what occurred protected activity, or knowledge of protected activity; or that Complainant has presented evidence sufficient to raise an inference the protected activity he argues was the likely reason for these actions.

Moreover it would be found, given the May 23, 1996-May 27, 1996 factual circumstances of the parties' evidence that the refusal to work - failure to report for work insubordinate reasons for Respondent's employment decisions were non-discriminatory and legitimate in the circumstances presented and were not a pretext. Further the Complainant has not persuaded by a preponderance of the credible evidence that the protected activity he argues was involved in Respondent's action or the more likely reason for their actions.<sup>14/</sup>

### **RECOMMENDED ORDER**

Accordingly, because I find that Complainant has not met the first element of his *prima facie* case and that Respondent's discharge of Complainant did not violate the Act, I therefore recommend that Complainant's case be dismissed.

**NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).**

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<sup>14/</sup> Complainant at hearing and in his post-hearing submissions appears to be raising a new issue of a §31105(a)(1)(A) violation based on what occurred when he took two days off (his September 25, 1996-September 26, 1996 shifts) to consult with his representative and attend this hearing. He posits he was told the company would place a notice of this "incident" in his attendance record. However review of Complainant's testimony at TR 157 indicates only that when he mentioned to some unnamed individual, whom he terms a supervisor, he had to take two days off he was told this would go on his attendance record. Complainant's testimony does not reflect he told this unidentified individual he was taking two days off for the purpose of this proceeding. It is assumed drivers' absences must be recorded by a business. Complainant's manner of representations on this late raised issue do not reflect specific, clear and unfuzzy information on which to adjudge whatever occurred, and when, falls under §31105(a)(1)(A). *Nolan v. A.C. Express*, 93-STA-38 (Sec. Dec. 5/13/94).